Supreme Court, U.S.
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No. 06-136

In The Supreme Court of the United States

ROGER GRUBBS,

Petitioner,

v.

KEN G. BAILES, MANUEL BALLARD, and HASKELL COUNTY, a duly designated county of the State of Oklahoma,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Petitioner Roger Grubbs, (Plaintiff in the underlying lawsuit, hereinafter "Petitioner"), presents two questions for the Court's review. First, Petitioner asks whether the grant of summary judgment in favor of the Respondents, Ken G. Bailes, Manuel Ballard, and Haskell County, a duly designated county of the State of Oklahoma, is contrary to the Court's decision in *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) thereby violating the standards of summary judgment and denying the Petitioner's right to a jury trial guaranteed by the Seventh Amendment. Respondents argue that the Tenth Circuit applied the correct standard for affirming summary judgment.

Second, Petitioner asks whether the Court of Appeals for the Tenth Circuit decided a federal question concerning the Petitioner's Equal Protection claim in conflict with Court of Appeals for the Seventh Circuit's decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Respondents contend there is no conflict between the Seventh Circuit's holding in *Esmail* and the Tenth Circuit's holding in the case at hand.

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SUMMARY OF REASONS TO DENY THE PETITION

A. SUMMARY OF MISSTATEMENT OF FACTS

The Petitioner claims his Fourth Amendment rights were violated when he was allegedly falsely arrested and maliciously prosecuted under Oklahoma law for feloniously pointing of a firearm. The Petitioner argues that the Tenth Circuit improperly weighed evidence in granting summary judgment in favor of the Respondents. However, Petitioner is in error. The Tenth Circuit did not improperly weigh evidence contrary to this Honorable Court's holding in *Celotex Corp. v. Cantrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Rather, the Tenth Circuit found there was insufficient evidence presented to vitiate the existence of probable cause in the issuance of the warrant for the Petitioner's arrest.

The Petitioner further contends that the Tenth Circuit, in error, failed to consider his malicious prosecution claim because it found that he failed to plead or allege facts to support such a claim. The Petitioner again is in error. The Tenth Circuit fully considered the malicious prosecution allegations as presented in the Petitioner's Fourth Amendment claim. Additionally, based on the facts particular to the Petitioner's allegations of malicious prosecution, the Tenth Circuit noted the Petitioner did not pursue the more likely claim of a First Amendment violation, and held it would not consider such a claim for Petitioner's failure to plead a First Amendment cause of action. Furthermore, the Tenth Circuit considered the Petitioner's clash with the Excise Board Member in its analysis of the Fourteenth Amendment Equal Protection

claim based on selective enforcement of the law, but noted that the Petitioner had failed to factually support any relationship between this clash and the failure to enforce the trespass laws. The Tenth Circuit further found that the Petitioner failed to support his Equal Protection claim by demonstrating how he was treated differently by persons similarly situated.

B. SUMMARY OF MISSTATEMENT OF LAW

Petitioner further claims there is a split in the authority between the Seventh and Tenth Circuits regarding selective enforcement claims under the Equal Protection Clause of the Fourteenth Amendment. The Petitioner is incorrect that the Seventh Circuit has held that a selective enforcement claim does not require evidence of unequal treatment under the law. In fact, the Seventh and Tenth Circuit are in accord regarding selective enforcement claims under the Equal Protection Clause.

STANDARD OF REVIEW

The Standard of Review Concerning Motions for Summary Judgments is *de novo. Haggerman v. United Transp. Union*, 281 F. 3d 1189 (10th Cir. 2002).

STANDARD OF LAW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving

party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of demonstrating the absence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A movant's summary judgment burden may be met properly by reference to the lack of evidence in support of Plaintiff's position. *Celotex*, 477 U.S. at 325. There is no issue for trial unless there is sufficient evidence for a jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 249-50. If the evidence is not significantly probative, then summary judgment is appropriate. *Id.* All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party, however, "allegations alone will not defeat summary judgment." *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 530 (10th Cir. 1994).

STATEMENT OF THE CASE

Petitioner Roger Grubbs petitions from the Tenth Circuit's affirmation of summary judgment in favor of the Respondents, Haskell County, Sheriff Manual Ballard, and Undersheriff Ken Bailes in this action under 42 U.S.C. § 1983. Petitioner alleged in his Complaint that Defendants violated his constitutional rights in two respects: (1) denying him equal protection under the law by failing to enforce trespass laws to protect his property, and (2) causing him to be arrested and prosecuted maliciously and without justification for a firearm offense, based on misleading information provided to the prosecuting attorney, after he personally confronted three trespassers.

Petitioner is one of some twenty shareholders in the McCurtain Lake Club Inc. (MLC), a corporation formed to acquire and hold certain lakeside land for the use of the shareholders. MLC owned the land and granted certain possessory rights to all shareholders free of charge. Specifically, each MLC shareholder was "leased" a cabin site for his or her exclusive use and was granted joint use of the remaining common areas. At the time of his arrest, Petitioner was president of the corporation, but at the time of the filing of his Complaint, he was not an officer.

One of the common areas next to MLC property was used by the public for off-road activities involving dirt bikes, ATVs, and the like. Petitioner testified in his deposition that since the late 1990's, he sought the assistance of the McCurtain County Sheriff's Office only four times requesting enforcement of the trespassing laws by these off-roaders onto MLC property. Regardless, on January 1, 2002, he took the law into his own hands. Armed with a pistol, he confronted three people, a woman, her son, and her nephew, who he insisted were riding four-wheelers onto MLC property. Accounts of this incident differ: Petitioner claims he merely showed the alleged trespassers that he was armed for self-protection; they reported that the Petitioner pointed the pistol at them and threatened them with it while ordering them to get off the property. Undersheriff Bailes was directed to investigate the conflicting complaints. He took statements from all parties and passed these on to assistant district attorney Danita Williams. He did not recommend any particular action, though he did comment that he did not believe the property had been posted properly, and he did not believe there is a clear policy on what Petitioner's duties were as president of MLC. Bailes also stated that Petitioner had no

right to pull a weapon on another person just to assert his opinions.

Based on the statements and her own interviews with the complaining witnesses, Williams made the decision to prosecute Petitioner. She directed Bailes to fill out a probable cause affidavit and then she presented the affidavit and the other collected documents to the State District Court Judge to secure a warrant. Petitioner was charged with violating Okla. Stat. tit. 21, § 1289.16 (Felony Pointing Firearms), for wilfully pointing a handgun at 13 year old J.H. his cousin J.A. and his aunt Bobbie Jean Anderson for the purpose of threatening and ordering them off the property where they were riding. Petitioner surrendered to authorities after reading about the issuance of a warrant for his arrest in the local newspaper. Petitioner posted a bond without spending any time in jail. The criminal case proceeded. Petitioner waived his right to a preliminary hearing. Then on the eve of trial, Petitioner, through his counsel, entered into an agreement to dismiss the case without prejudice upon payment of court costs. Petitioner then brought an action challenging his arrest and complaining of the Sheriff's failure to enforce the property rights of MLC and its members.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT GRANT CERTIORARI BASED ON THE PETITIONER'S INCORRECT ASSERTION THAT THE COURT OF APPEALS COMMITTED ERROR.

This Court has long stated that certiorari jurisdiction is not merely a tool for the correction of perceived errors by

the lower federal courts, "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981). Rather, certiorari jurisdiction should be used only in those "cases of peculiar gravity and general importance," or to secure uniformity in the Circuits. *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916)). The Petitioner urges this Court to grant certiorari to reapply the facts of his case to the law and to correct a perceived conflict between the Seventh and Tenth Circuits. However, the Petitioner has failed to demonstrate any such conflict and his Petition is nothing more than a request for appellate review concerning the application of undisputed facts to well established doctrine.

II. THE TENTH CIRCUIT CORRECTLY FOUND INSUFFICIENT EVIDENCE IN THE RECORD TO VITIATE A FINDING OF PROBABLE CAUSE, AND PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS.

The Petitioner was charged with feloniously pointing of a firearm in violation of Okla. Stat. tit. 21, § 1289.16. The charge was based on a probable cause affidavit and witness statements submitted to the Judge of the District Court of Oklahoma for Haskell County. The statute makes it a felony to:

> willfully . . . point a [firearm] or any deadly weapon . . . at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for

> any purpose of injuring, either through physical injury or mental or emotional intimidation or for the purposes of whimsy, humor or prank, or in anger or otherwise, but not to include pointing [a firearm] . . . in the defense of any person, one's home or property . . .

The Petitioner alleges that the warrant issued for his arrest was a product of a misleading presentation of material facts in the probable cause affidavit. Knowingly and recklessly omitting material information from a probable cause affidavit violates a person's Fourth Amendment rights. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1285-90 (10th Cir. 2004). However, for omissions to rise to the level of a Constitutional violation, the omitted facts must be material and be so probative as to negate probable cause. *Stewart v. Donges*, 915 F.2d 572, 582 n.13 (10th Cir. 1990). To ascertain whether there is a Constitutional violation, the affidavit must be examined as if the material omitted information had been included and determining whether probable cause would have still existed to issue the warrant. *See Pierce*, 359 F.3d at 1293-95.

The Tenth Circuit correctly found that Mr. Bailes' probable cause affidavit, and witness statements taken from the Petitioner as well as the other complainants were submitted to the State Court in order to secure an arrest warrant. *Grubbs v. Bailes*, 445 F.3d 1275, 1278-79 (10th Cir. 2006). The Tenth Circuit correctly rejected the Petitioner's argument that his statement taken by Mr. Bailes was sufficient, in and of itself, to vitiate probable cause. *Id.* at 1278. The Tenth Circuit found that Mr. Grubbs' statement contained no "compellingly credible" or "uniquely exculpatory" information. *Id.* at 1278. The Tenth Circuit correctly opined that "a suspect's contradiction of a witness'

accusations is not sufficient to vitiate probable cause; otherwise, it would be virtually impossible to secure a warrant for anyone but a confessed offender." *Id* at p. 1278. The Tenth Circuit correctly found the facts within Mr. Grubbs' statement "unremarkable in a criminal law setting". *Id* at 1279.

The Tenth Circuit further considered whether the omission of certain facts would have vitiated probable cause. The Tenth Circuit emphasized that the facts that the Petitioner alleged vitiated probable cause were not material to that determination. *Id.* The Tenth Circuit found that each of the facts allegedly omitted from the affidavit were material only to the issue of whether the complaining witnesses were trespassing. *Id.* The Tenth Circuit found that Oklahoma law permits the defense of one's own home or property, but that the defense does not encompass threatening trespassers with a firearm. *Id.* The Tenth Circuit concluded that any facts that the Petitioner could provide that tended to show the witnesses were trespassing would not vitiate probable cause for the issuance of an arrest warrant under Okla. Stat. tit. 21, § 1289.16, Felony Pointing Firearms.

The Petitioner argues that the Tenth Circuit interpreted Oklahoma law incorrectly regarding the use of firearms in defense of property. The Petitioner urges that the Tenth Circuit's reliance on Oklahoma Supreme Court precedent prior to 1947 was improper in light of the statutory provision enacted in 1971. However, the Petitioner's argument in this regard is flawed. Overlooking the fact that none of these cases have been abrogated by Okla. Stat. tit. 21, § 1289.16, the Petitioner fails to mention that defense of property is defined within the Oklahoma Statutes. Defense of property is justified under Oklahoma law only "[w]hen committed . . . in preventing

or attempting to prevent . . . any trespass or other unlawful interference with real or personal property in [the lawful possession of the defender]; **provided the force or violence used is not more than sufficient to prevent such offense.**" Okla. Stat. tit. 21, § 643. (emphasis added). This statute is wholly consistent with the Oklahoma Supreme Court opinions cited by the Tenth Circuit in its order, which hold that absent the threat of felonious activity, defense of property only encompasses the use of reasonable non-deadly force. Therefore, the Tenth Circuit was absolutely correct in its interpretation of Oklahoma law.

The Petitioner alternatively urges that since the destruction of property in Oklahoma may constitute a felony, then the omission of the fact regarding the cutting of the barbed wire fence necessarily vitiated the determination of probable cause. The relevant statute in Oklahoma is Okla. Stat. tit. 21, § 1760, which makes it a felony for a person to destroy the property of another in excess of $2,500, otherwise it is a misdemeanor. Even assuming, for argument's sake, that the Petitioner stated he witnessed the complaining witnesses cut the barbed wire fence (which is not in the record), the repair value of the barbed wire fence would not transmute what is otherwise a misdemeanor offense under Oklahoma law into a felony. Nevertheless, as already emphasized by the Tenth Circuit, this fact is both immaterial and insufficient to negate probable cause that the Petitioner committed the crime of feloniously pointing of a firearm.

It is improvident to hold that a justification or an excuse to a crime vitiates probable cause to make an arrest for that crime. Especially, as here, where the underlying acts for the commission of a crime are present but the offender claims he is justified or excused. It is not the

province of a police officer to determine whether or not someone is guilty or innocent of a crime, but only whether or not there is reasonable belief that the essential elements of a crime have been committed by the person being arrested. When an officer receives information about an alleged offense from a witness who it seems reasonable to believe is telling the truth, the officer has probable cause to make an arrest. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986). Here, Mr. Bailes had the statements of three witnesses. Furthermore, as was stated by the Tenth Circuit in its Order, permitting an assertion of a justification or an excuse to a crime to vitiate probable cause would make securing an arrest warrant impossible without a confession. 445 F.3d at 1278. The Tenth Circuit's affirmation of the district court's grant of summary judgment in favor of the movants was proper under Fed. R. Civ. P. 56 in light of the Petitioner's failure to create a genuine issue of fact to submit to a jury regarding the issue of probable cause. Accordingly, with no issue sufficient to submit to a jury, the Petitioner's right to a jury trial under the Seventh Amendment has not been infringed.

III. THERE IS NO CONFLICT BETWEEN THE SEVENTH AND TENTH CIRCUITS REGARDING SELECTIVE ENFORCEMENT CLAIMS SOUGHT PURSUANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioner argues that the Tenth Circuit incorrectly stated he failed to argue his malicious prosecution claim to the district court, and improperly denied his equal protection claim. In support of this argument, the Petitioner contends that the Seventh and Tenth Circuits are in

conflict regarding selective enforcement claims pursued under the Equal Protection Clause of the Fourteenth Amendment, and the Seventh Circuit authority establishes the proper standard. However, the Petitioner has misread the Tenth Circuit opinion in this case, as well as Seventh and Tenth Circuit authority regarding selective enforcement claims.

As an initial matter, the Tenth Circuit did find that the Petitioner "interject[ed] his suspicion" throughout his brief that Mr. Bailes omitted facts from the probable cause affidavit and failed to enforce the trespassing law in retaliation for the Petitioner's exposure of a county official for illegally dumping trash. 445 F.3d at 1279. The Tenth Circuit noted that the Petitioner advanced this argument only generally, instead of asserting the more common claim of a First Amendment violation, which the Petitioner failed to plead or even argue before the district court. *Id.* More importantly, the Tenth Circuit recognized that the Petitioner instead of pursuing a First Amendment claim, "chose to proceed on other constitutional grounds," specifically his Fourth Amendment false arrest and malicious prosecution claims, and his Fourteenth Amendment Equal Protection claim of selective enforcement. *Id.*

After discussing the merits of the Fourth Amendment claim, the Tenth Circuit then analyzed the Petitioner's Equal Protection claim and found no evidence in the record that demonstrates the Petitioner's clash with the county official was related in any manner to the failure to enforce the trespassing law. *Id.* at 1282, n.3. The Tenth Circuit further found the evidence presented to the district court was insufficient to demonstrate a triable issue of unconstitutionally inadequate law enforcement, and emphasized that the Petitioner had even failed to establish that he was

treated differently than similarly situated persons as required in an Equal Protection analysis. *Id.* at 1282.

The Petitioner challenges this holding of the Tenth Circuit, and claims that there is a conflict between the Seventh and Tenth Circuits concerning whether unequal treatment is a requirement for asserting a valid Equal Protection claim in selective enforcement claims. In support of this contention, the Petitioner cites *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995).

The Petitioner argues that the Seventh Circuit in *Esmail* recognized a claim for selective prosecution under the Fourteenth Amendment, "even if there has been no unequal treatment where other parties have been treated more leniently." In *Esmail*, the plaintiff was a liquor dealer who claimed the local government selectively denied his application for a liquor license, because he had employed an unregistered manager for an hour and a half. *Id.* at 177. The *Esmail* plaintiff presented evidence that other liquor dealers had received liquor licenses in spite of more egregious offenses, such as serving liquor to minors and committing battery against police officers. *Id.* at 178. The *Esmail* Court recognized that equal protection under the law does not just mean treating "identically situated persons identically." *Id.* at 179. The *Esmail* Court expounded that the element of unequal treatment is satisfied in a selective prosecution claim, if others similarly situated to a plaintiff, in that case liquor license applicants, receive lighter or no sanctions for more serious infractions. *Id.* at 179.

The *Esmail* Court did not hold that a plaintiff need not demonstrate unequal treatment in an Equal Protection claim. The Seventh Circuit did hold that unequal

treatment in selective prosecution cases is alone insufficient to state a Constitutional claim, because selective prosecution has two meanings under the law. *Id.* at 178-79. Citing *Wayte v. United States*, 470 U.S. 598, 607-08, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985), the Seventh Circuit explained selective prosecution is nonactionable under the Constitution if the resulting pattern of nonenforcement is, *inter alia*, random, a result of ineptitude or due to a lack of adequate resources. *Id.* at 178. For the unequal treatment to become actionable, the Seventh Circuit held that a plaintiff must demonstrate the selective prosecution was "spiteful" retaliation "for reasons wholly unrelated to any legitimate state objective." *Id.* at 180.

Furthermore, the Tenth Circuit is in complete harmony with the Seventh Circuit with respect to selective enforcement claims pursued under the Equal Protection Clause of the Fourteenth Amendment. In *Bartell v. Aurora Public Schools*, 263 F.3d 1143 (10th Cir. 2001), the Tenth Circuit, relying on *Esmail*, held that a selective enforcement claim is one cognizable under the Fourteenth Amendment. The Tenth Circuit, quoting *Esmail*, held that to sustain a selective enforcement claim, a plaintiff must prove that he was singled out for persecution "wholly unrelated to any legitimate state objective." *Id.*, 263 F.3d at 1149. The Tenth Circuit further emphasized that a plaintiff must still demonstrate that he was treated differently than similarly situated persons. *Id.*

The Tenth Circuit's opinion in *Grubbs v. Bailes* does not conflict with *Bartell* or *Esmail*. Rather, the Tenth Circuit found "there is no evidence in the record that defendants' alleged failure to enforce trespassing laws with respect to MLC property was related to plaintiff's

clash with the excise board member he turned in for illegally dumping trash." 445 F.3d at 1282 and n.3. The Petitioner's assertion that the Tenth Circuit is in conflict with the Seventh Circuit is wholly unfounded. The Petitioner's plea to this Court is premised simply on a perceived error in application of facts to the law by the lower courts, which is an insufficient purpose to grant certiorari jurisdiction. Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has clearly failed to submit a question to this Court worthy of review. As discussed, Petitioner's Petition for Writ of Certiorari, Petitioner has presented only two questions for the Court, one of which asks this court to review the lower federal court's application of uncontroverted facts to correctly stated law, the other incorrectly states there is a conflict among the Seventh and Tenth Circuits regarding the standards to be applied in an Equal Protection Claim. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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